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No. 453 ~~Misc.~~

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

THE STATE OF TEXAS,
Petitioner

v.

LESLIE DOUGLAS ASHLEY and CAROLYN LIMA,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

LESLIE DOUGLAS ASHLEY and CAROLYN LIMA,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Supreme Court of the United States:

Comes now the State of Texas, petitioner in this cause, and respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit reversing the judgment of the United States District Court for the Southern District of Texas, Houston Division, and granting respondents' writ of habeas corpus.

PRIOR OPINIONS

The judgment of the Court of Appeals is printed in Appendix A, *infra*, Page 17. The majority and dissenting opinion of the Court of Appeals has not been reported, but is printed in Appendix B, *infra*, Page 19. Petition for rehearing *en banc* was overruled and is printed as Appendix C, *infra*, Page 33. The judgment and order of the District Court for the Southern District of Texas is not reported but is printed in Appendix D, *infra*, Page 34. The opinion of the Court of Criminal Appeals of Texas affirming respondents' conviction and overruling motion for rehearing is reported as *Ashley and Lima v. State of Texas*, 362 S.W. 2d 847, and is printed in Appendix E, *infra*, Page 35.

JURISDICTION

On June 25, 1963, the Court of Appeals for the Fifth Circuit reversed the judgment of the district trial court and remanded the case with directions to issue the writ of habeas corpus. On July 30, 1963, petition for rehearing *en banc* was denied. On August 15, 1963, the Circuit Court ordered that the issuance of the mandate be stayed for a period of thirty days to permit petitioner to apply for a writ of certiorari from this Honorable Court. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

In a criminal prosecution where no demand or request has been made, does the passive non-disclosure by the prosecuting authorities of a disputed psychiatric and psychological opinion that the accused person is "legally in-

competent", which matter was available to the accused and was never brought into issue in the trial of the case, deny to the accused due process of law?.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourteenth Amendment, Sec. 1, which reads in part as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

Since respondents' contention upon which the Circuit Court granted relief was that the prosecution suppressed evidence favorable to them, the statement of the pertinent facts of this case must be considerably more lengthy than ordinarily necessary.

This is a criminal case in which both respondents were jointly indicted, tried, convicted and assessed the death penalty by a jury for the shooting death of Fred Tones, a real-estate man, on February 6, 1961. Respondents' motion for a new trial was overruled by the trial court and they appealed to the Court of Criminal Appeals of Texas, which is the highest court having criminal jurisdiction in the State. The Court of Criminal Appeals of Texas delivered its unanimous opinion affirming the judgment of the trial court on June 20, 1962. Respondents filed motion for rehearing which was overruled unanimously by the Court of Criminal Appeals on October 31, 1962. Respondents' second motion for rehearing was overruled without written opinion on January 2, 1963. The case is reported as *Ashley & Lima v. State*, 362 S.W.2d 847.

As a result of a fire on a vacant lot in Houston at approximately 8:30 p.m. on the night of February 6, 1961, a gasoline-soaked, burning human body, clothed only in socks and a shirt, was discovered with an empty five-gallon gasoline can nearby. The following day, the deceased's identity was established as that of a real-estate man, Fred A. Tones; and in addition to his body having been burned, it was established that he had been shot six times with a .22 caliber weapon causing death prior to the burning. An examination of his real-estate office revealed blood spots both inside and outside. Tones' 1960 Lincoln automobile and a portable television set were missing. Because the two respondents had been seen entering the office of the deceased at approximately 5:15 p.m. on February 6, 1961, a search for them began. The respondents' automobile, minus its license plates, was located at the home of the mother and step-father of respondent Ashley. The clothing of the deceased, including his pants, shorts and shoes, and his briefcase, was found on various streets at different locations within the same general area of the city. It was also shown that the respondents had purchased a .22 caliber pistol on February 4, 1961; that they were "practice shooting" into a ditch with it on February 5, 1961, and that the bullets recovered therefrom matched the bullets recovered from the body of the deceased. The markings on the .22 caliber spent hulls recovered from the roadside matched the markings on the six .22 caliber spent hulls subsequently recovered from an apartment in New Orleans, Louisiana, rented by both respondents on February 7, 1961, for a period of one week but lived in by them only on the night of February 7. Tire tracks near the burning body matched the tires on the automobile of the deceased. It was also shown that only a few minutes before the burning body of

the deceased was discovered, respondent Lima had purchased five gallons of gasoline in the gasoline can found beside the burning body of the deceased. It was further shown that approximately two hours after his burning body was discovered, both respondents drove into a service station in the white Lincoln automobile, had it filled up with gasoline, and had the attendant put on a rear license plate. At approximately 11:00 a.m. on February 7, 1961, both respondents, using the name Mr. and Mrs. Charles Adams, rented an apartment in New Orleans, Louisiana, for a period of a week, but only remained the one night, leaving behind locked in the apartment some clothing, cufflinks belonging to the deceased, the six spent .22 caliber hulls previously mentioned, and a large, German Shepherd dog which the respondents had purchased from the Houston Humane Society on February 4, 1961. It was further shown that respondents, driving the 1960 white Lincoln automobile, purchased a tankful of gasoline on February 10, 1961, in Elkton, Maryland. On February 22, 1961, the Lincoln automobile belonging to the deceased, and bearing the missing license plates from the respondents' automobile, was found parked in New York City, and fingerprints of both respondents were removed therefrom. It was also shown on February 26, 1961, the respondents were arrested as they arrived in a taxi-cab at a residence at 424 West 57th Street in New York City, at which time respondent Ashley was dressed as a female. A search of their apartment at that address revealed the television set missing from the real-estate office of the deceased, the deceased's wrist watch, and a box of .22 caliber cartridges. A search of respondent Lima's handbag revealed the keys to the Lincoln automobile belonging to the deceased.

Both respondents testified and admitted killing the deceased by shooting him with the .22 caliber pistol, depositing his body on the vacant lot and setting fire to it after saturating it with gasoline. Respondent Lima, a confessed prostitute, and respondent Ashley, a confessed homosexual and procurer for respondent Lima, based their defense upon self-defense, defense of each other and accident. Their testimony was that the deceased had paid respondent Lima for sexual intercourse on several occasions prior to the day in question and that on the evening of the killing, they had gone to the office of the deceased for the purpose of a "three-way" date between both of them and the deceased. They testified that after the deceased and respondent Lima had removed their clothing and were in the process of committing oral sodomy on each other at the same time, the deceased began hurting the respondent Lima and she became scared for her life, as did respondent Ashley; that Ashley came to her aid and attempted to get the deceased off Lima; that a struggle ensued during which time the deceased picked up a large bayonet and began swinging it at both respondents; that respondent Ashley then got the pistol from the handbag of respondent Lima and shot the deceased one time; that the deceased continued his assault with the bayonet, at which time respondent Lima secured the pistol and shot the deceased five more times. They further testified that they then loaded the body of the deceased into his Lincoln automobile, carried it to the lot, poured gasoline on it and set fire to it. Later that night, after removing approximately $115.00 from the deceased's billfold, they departed for New Orleans in the deceased's Lincoln automobile. Their testimony further shows that after they learned from the newspapers in New Orleans that there was a search for them in that

city, they departed for New York City where they lived in three different apartments under three different names until they were arrested.

Rebuttal evidence by the state shows that the souvenir bayonet in the deceased's office was dust-covered when it was observed on February 7, the day after the killing; that on Saturday prior to the killing on Monday, respondent Ashley had attempted to get the witness Ramirez to go to New York with him and respondent Lima, and that they would get the money to go on "some way".

Further rebuttal evidence by the state revealed that at the time respondent Lima made her oral confession upon arrest in New York she did not tell the officers anything about the assault by the deceased upon her and Ashley as she testified to from the stand, but that all she told the officers was that "she believed Mr. Tones was a threat"—"either the result of blackmail or physical assault or insult".

After both respondents were returned from New York City, they were placed in the Harris County Jail and were held without bail.

Dr. Benjamin Sher, a highly qualified psychiatrist, is employed as such by Harris County. One of his primary duties is to examine prisoners charged with a criminal offense for the purpose of determining the prisoner's sanity or insanity.

Because insanity of the defendant is often raised as a defense to a serious crime, it is the established policy of the Harris County District Attorney's Office to have all defendants who are charged with particularly brutal crimes examined by more than one psychiatrist for the purpose of determining his sanity or insanity. In accordance with

this policy, the District Attorney requested Dr. Benjamin Sher and Dr. Howard Crow, another psychiatrist, to examine both Ashley and Lima very shortly after they were placed in the Harris County Jail. Dr. Sher secured the services of Dr. Sanford Goldstone, a psychologist, to assist him in this evaluation. Dr. Crow secured the services of Dr. Jack Tracktir, a psychologist, to assist him in his evaluation. Additionally, Mr. Jack Knight, who was counsel for both respondents, secured the services of Dr. Neil Burch, a psychiatrist, to examine both respondents to determine their sanity or insanity.

On March 13, 1961, Dr. Sher submitted to the District Attorney's Office his quite detailed written report on both respondents, concluding that each was "of sound mind".

On April 3, 1961, Dr. Goldstone submitted to the District Attorney's Office his quite detailed written report on both respondents, concluding as a result of the psychological tests, he found no evidence of psychosis (insanity) in either respondent.

Shortly after March 15, 1961, Dr. Burch submitted to Mr. Jack Knight, counsel for both respondents, his greatly detailed written report of the psychiatric examination of both respondents. His conclusion was that

> "neither Leslie Douglas Ashley nor Carolyn Lima are now or were at the time of the commission of the alleged crime suffering from psychiatric disorder which could be construed as insanity in the legal sense of the word. They are now and were at the time of the commission of the alleged crime aware of the nature and extent of the act".

On May 25, 1961, the day after the verdict was returned by the jury against both respondents, Dr. Crow

wrote a letter to the District Attorney stating that as a result of the examination made by him and Dr. Tracktir, they were of the opinion that both respondents "were legally incompetent as we understand the laws of Texas referrable to this kind of problem".

This is the *only* written communication ever received from either Dr. Crow or Dr. Tracktir in this case. As stated in the letter, there was a brief telephone conversation between the District Attorney and Dr. Crow on the day the trial began. As far as can be remembered, the conversation was brief and followed the language of the letter with the exception Dr. Crow stated that he felt the respondents were "sick". This conversation was the *only* such conversation between the District Attorney or any member of his office and Dr. Crow prior to or during the trial. There was *no* contact between Dr. Tracktir and the office of the District Attorney prior to or during the trial.

Further, at no time prior to the trial of respondents was it suggested to the office of the District Attorney by any lay witness that either respondent was insane or psychotic. Neither their attorney, their families nor any of the jailers in daily contact with them reported any unusual behavior or indication of insanity.

RESPONDENTS DID NOT EVEN ALLEGE THAT THE DISTRICT ATTORNEY, OR ANY PERSON ACTING IN HIS BEHALF, PERSUADED OR EVEN REQUESTED DR. CROW OR DR. TRACKTIR TO REFRAIN FROM TALKING TO ATTORNEY JACK KNIGHT, WHO REPRESENTED RESPONDENTS UPON THEIR TRIAL, OR TO ANYONE ELSE.

Following the conviction, an affidavit was filed alleging the respondent Ashley was insane, and on December 10,

1962, an extended sanity hearing was held in the trial court. The jury, after hearing the testimony of Dr. Crow, Dr. Tracktir and other medical witnesses, found Ashley to be sane.

No such affidavit of insanity on behalf of respondent Lima has been presented to any court which had jurisdiction to conduct a hearing on that issue. In fact, prior to this proceeding, no serious contention has been made heretofore regarding the sanity of respondent Lima.

It was upon these facts that the Court of Appeals held that the failure of the prosecutor to inform counsel for respondents "of this fact amounts to such fundamental unfairness in the trial of a criminal case as to amount to a denial of due process".

REASONS FOR GRANTING THE WRIT

1. This Court should review this case because the decision of the Circuit Court is without precedent. Never before the decision in this case has a court held in a criminal prosecution where no demand or request has been made that the passive non-disclosure by the prosecution of non-material evidence constitutes deprivation of due process.

As authority for its decision, the Circuit Court cites four cases:

(a) *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177.

In that case it was alleged that testimony material to petitioner's defense "was repressed under threat and coercion by the State" and that other witnesses were "intimidated and their testimony suppressed." This court correctly

held that a petitioner whose imprisonment results from perjured testimony knowingly used by state authorities to obtain a conviction, and from deliberate suppression by the same authorities of evidence favorable to him, is entitled to a writ of habeas corpus.

There is no allegation in the instant case that perjured testimony was used to obtain respondents' conviction. Likewise, there was no allegation by respondents of any facts amounting to deliberate suppression of evidence favorable to them. Respondents do not even suggest that the prosecuting authorities persuaded, requested, or even suggested to Drs. Crow or Tracktir that they not reveal their findings to Attorney Knight or anyone else interested in the matter on respondents' behalf. On the contrary, there is an affidavit by Dr. Crow before this Honorable Court stating that he would have made known to Attorney Knight his opinion if the attorney had approached him regarding it. This statement must be considered together with the inescapable fact that respondents knew of their examinations by Drs. Crow and Tracktir.

(b) *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103.

In that case the prosecutor was a party to the use of *false testimony*, leading to the conviction of petitioner. Part of the opinion in the Alcorta case is quoted in the majority opinion of the Circuit Court, as follows:

> "It cannot seriously be disputed that Castilleja's testimony, taken as a whole, gave the jury the false impression that his relationship with petitioner's wife was nothing more than that of casual friendship. *This testimony was elicited by the prosecutor who knew of the illicit intercourse between Castilleja and peti-*

tioner's wife. Undoubtedly Castilleja's testimony was seriously prejudicial to petitioner." (emphasis the writer's)

Here again, positive and wrongful action was taken by state authorities resulting in a denial of due process to the accused.

In the instant case, there is no allegation that false testimony was used to convict respondents—let alone that such was knowingly used by state authorities. In fact, there is no allegations that the prosecutors took any *affirmative wrongful* act whatever in bringing about respondents' conviction.

(c) *United States v. Dye*, 3 Cir., 221 F. 2d 763.

As opposed to the instant case, *where insanity was not an issue*, in the Dye case *drunkenness of the accused was a vital issue*. There the prosecutor knew that at least one police officer was of the opinion the accused was intoxicated. The prosecutor excused the witness from attendance on court and not only failed to call him as a witness or inform defense counsel of his opinion, he (the prosecutor) actually stated to the court and jury that the officer, if called as a witness, "would *corroborate what has already been testified to.*"

There again, the prosecuting authority actively misrepresented to the court and the jury facts which were directly in issue in the trial of the case.

(d) *United States v. Rutkin*, 3 Cir., 212 F. 2d 641.

This case is certainly no basis for holding that "mere suppression of evidence by the prosecutor" amounts to a

denial of due process. The Rufkin case holds, and *all* that it holds, is that the allegations of that particular petition were sufficient to allege *knowing use of perjured testimony* by the government, resulting in a conviction.

Again, this is not even present in the instant case.

2. This Court should review this case because the majority opinion of the Circuit Court erroneously holds that the prosecuting authorities suppressed evidence resulting in a denial of due process of law to respondents when the "evidence suppressed" was the opinion of a psychiatrist and psychologist who had *personally examined each of the respondents.*

It is hornbook law that the prosecution cannot suppress evidence or facts known to the defense. *United States v. Sobell*, 142 F. Supp. 515, affirmed 244 F. 2d 520, cert. den. 355 U.S. 873, 78 S.Ct. 120, reh.den. 355 U.S. 920, 78 S.Ct. 338.

The prosecutor in this case had a *right* to rely upon the inescapable fact that respondents knew they had been examined by Drs. Crow and Tracktir and had so advised their attorney.

In this regard it must be remembered that the prosecutor was aware of the fact that two psychiatrists (one of whom had been employed by respondents) and a psychologist had rendered the opinion that both respondents were legally sane.

Also, in this regard, it must be remembered that insanity as a defense to crime in Texas is a matter which must be raised by the defendant—it cannot be raised by the prosecution. *Ex parte Hodges*, 314 S.W. 2d 581. Also see: *Tremblay v. Overholser*, 199 F. Supp. 569.

There is no duty upon a prosecutor to reveal to the defendant or present to the court a question which an intelligent and well-represented defendant sees fit not to raise on his own behalf (*Sobell*, supra), and the decision of the Circuit Court holding that there was such a duty is incredible.

Petitioner contends that this case must be decided on the basis of practicality and reality rather than the intangibles which might have been.

3. This Court should review this case because the majority opinion of the Circuit Court destroys ***the necessity of an element set out by this Honorable Court*** in its decision of May 13, 1963, in *Brady v. Maryland*, 83 S.Ct. 1194. In that case, the following statement is made:

> "We now hold that the suppression of evidence favorable to an accused *upon request* violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (emphasis the writer's)

In a case such as this, where it is absolutely inescapable that the respondents knew of their examinations by Drs. Crow and Tracktir, they should *at least be required to* ***make a request*** for the evidence alleged to have been suppressed.

4. This Court should review this case because if the decision of the Circuit Court becomes final, it will abolish the adversary system in criminal prosecutions.

The majority opinion places the burden upon the prosecuting authorities to *volunteer* to defense counsel *all information* that comes to their knowledge *prior to or during trial* without regard to

(1) its materiality on trial

(2) its accuracy or authenticity

(3) its inconsistency with other information of a similar nature

(4) its availability to the accused, and

(5) whether or not the accused already knows of its existence.

CONCLUSION

Wherefore, premises considered and for the reasons stated, petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

FRANK BRISCOE
District Attorney
Harris County, Texas

SAMUEL H. ROBERTSON, JR.
First Assistant District Attorney
Harris County, Texas

CARL E. F. DALLY
Assistant District Attorney
Harris County, Texas
Criminal Courts Building
301 San Jacinto
Houston, Texas 77002

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Carl E. F. Dally, Assistant District Attorney, Harris County, Texas, am a member of the Bar of the Supreme Court of the United States, and I do now enter my appearance in the Supreme Court of the United States in the above captioned cause, in behalf of the Petitioner; I do further certify that a copy of the foregoing Application for Writ of Certiorari has been forwarded by the United States Mail, Postage Prepaid, to Respondent Ashley's Attorney, Mr. Lloyd M. Lunsford, 406 Pennsylvania Avenue, South Houston, Texas, and to Respondent Lima's Attorney, Mr. Clyde W. Woody, 1114 Texas Avenue Building, Houston 2, Texas, and to Mr. James J. Hippard, Counsel for American Civil Liberties Union, 1226 Americana Building, Houston 2, Texas.

CARL E. F. DALLY
Counsel for Petitioner

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1962

No. 20457

D. C. Docket No. 63-H-225 Civil

LESLIE DOUGLAS ASHLEY and CAROLYN LIMA,
Appellants

v.

THE STATE OF TEXAS, ET AL.,
Appellees

Appeal from the United States District Court for the Southern District of Texas

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Before TUTTLE, Chief Judge, JONES, Circuit Judge, and DeVANE, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the trial court in denying the application for writ of habeas corpus in this cause be, and the same is hereby REVERSED, and that this cause be, and it is hereby REMANDED to the trial court with directions to issue the writ, and discharge the prisoners, without, of course, in any way precluding a new trial by the State of Texas; and that the stay of execution heretofore entered by Judge Brown is continued until a final disposition of the matter in the Southern District of Texas.

It is further ordered and adjudged that the appellees, The State of Texas, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

DeVANE, District Judge, Dissenting

June 25, 1963

ISSUED AS MANDATE:

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20457

LESLIE DOUGLAS ASHLEY and CAROLYN LIMA,
Appellants

v.

THE STATE OF TEXAS, ET AL.,
Appellees

Appeal from the United States District Court for the Southern District of Texas

(June 25, 1963)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and DeVANE, District Judge.

TUTTLE, Chief Judge: This is an appeal from the denial by the district court of the appellants' petition for habeas corpus based on their allegations that in their trial and conviction for murder and sentence to death, they had been denied constitutional rights under the Fourteenth Amendment to the Federal Constitution.

The facts upon which the appellants base their claim for a new trial in the Texas State Court are not seriously in dispute. The appellants were tried for the murder of a real estate man in the city of Houston, whose killing they admitted, after, or during, a three-party sexual orgy in the office of the deceased. Appellant Ashley was a homosexual and transverstite (he frequently dressed in women's clothes for the purpose of attracting men). Appellant Carolyn Lima was a seventeen year old prostitute, who had been living with Ashley. Both of them had been supported by their earnings in prostitution.

At the time of their trial they asserted only the defense of self defense and defense of each other, claiming that the deceased had become violent in his treatment of Carolyn Lima and a struggle ensued which resulted in his being shot and killed by one or the other of the appellants. No defense of insanity was interposed, although the appellants had engaged a clinical psychiatrist, a Dr. Burch, to examine them prior to trial. Dr. Burch expressed his opinion to Jack Knight, counsel for appellants, "It is my opinion that neither Leslie Douglas Ashley nor Carolyn Lima are now or were at the time of the commission of the alleged crime suffering from psychiatric disorder which could be construed as insanity in a legal sense of the word. They are now and were at the time of the commission of the alleged crime aware of the nature and extent of the act."[1]

The District Attorney for Harris County followed his usual policy on the occasion of the commission of a serious crime by calling on the regularly employed County psychiatrist, Dr. Sher, to examine the appellants, and, without

[1] This, of course, is not a comprehensive definition of legal insanity. See Howard v. United States, 5 Cir., 232 F. 2d 274.

the knowledge of counsel for appellants, engaged a Dr. Howard Crow, a practicing psychiatrist, to examine both of the appellants. Dr. Crow was assisted in his examination by a Dr. Jack Tracktir, a psychologist. On March 13, 1961, Dr. Sher made his written report stating that both of them were "of sound mind." The trial commenced on May 15, 1961. It lasted for nine days, being finally concluded on May 24th. The jury found the appellants guilty, and they were sentenced to be electrocuted. On May 25th, Dr. Crow wrote a letter to the District Attorney which, because of its significance, is copied in full:

"May 25, 1961

Mr. Frank Briscoe
District Attorney
Room 501
Court and Jail Building
301 San Jacinto
Houston, Texas

Re: Leslie Douglas Ashley
and
Carolyn Ann Lima

Dear Mr. Briscoe:

Dr. Jack Tracktir and I evaluated Leslie Douglas Ashley, white male, 23 years of age, and Carolyn Ann Lima, 18 years of age, in the Harris County Jail, Houston, Texas March 22, 1961. We felt they were legally incompetent as we understand the laws of Texas referrable to this kind of problem. Again on April 8, 1961 I evaluated Leslie Douglas Ashley and Carolyn Ann Lima alone, and again I felt they were legally incompetent.

"As you may recall I offered to talk with you, and wanted to talk with you, about this prior to their recent trial, and ultimately I discussed this by telephone on the day of the beginning of their recent trial."

Find attached bill for my services and a bill for Dr. Jack Tracktir's services.

Respectfully yours,
Howard G. Crow, M.D."

HGC:ds

Mr. Knight, counsel for the appellants, knew nothing of the examination by Drs. Crow and Tracktir either during the trial or for a considerable period thereafter. Other counsel subsequently learned of the examination by these two doctors and of their opinions that appellants were legally incompetent, whereupon they moved on December 10, 1962, for a judgment of insanity as to Ashley, for whom alone they had been employed. The inquiry that followed this motion merely touched upon whether Ashley was legally sane at the time of the hearing, approximately eighteen months after the date of the trial and even longer after the time of the alleged crime. On the occasion of this hearing Dr. Crow testified:

> "I felt he exhibited schizophernia and paranoia and giggling, etc., and I felt it was chronic, and I felt that he was incompetent at that time, and my understanding was that he was legally incompetent in accordance with my definition of the law—as I understand it. I feel that he was insane, and I made a record of it on 3-22-61 and on 4-8-61."

Later on he testified as follows:

"Q. Dr. Crowe, did you report your findings to Mr. Briscoe? [the District Attorney]

A. Yes, sir I talked to him about it and I told him in a letter—I stated that I felt Douglas Ashley was incompetent, he was sick and in talking with Mr. Briscoe, I told him that I felt that this man Douglas Ashley needed treatment in a hospital and he was sick and a schizophrenic, and I did that on 3-22-61 and 4-8-61 . . .

Q. I believe you said you had a discussion with Mr. Briscoe on at least two occasions?

A. Mr. Briscoe got my findings and professional opinion that Mr. Ashley was a schizophrenic and incompetent to understand what the trial would be about, and I felt that he was chronically ill and had been for a long time, and we discussed this and I wrote him an opinion about Douglas Ashley being incompetent."

Although this testimony was in terms of Ashley's condition only, it is clear in view of Dr. Crow's letter quoted above that he reported as to both Ashley and Lima on the same dates before trial.

All of the foregoing facts touching the conclusions by Drs. Crow and Tracktir that the appellants were legally incompetent and that this opinion was communicated to the District Attorney were submitted to the trial court in the petition for habeas corpus filed on March 29, 1963, together with a petition for a stay of execution.

Upon consideration of the application but without a hearing, the trial court denied the petition and denied the stay of execution. Thereupon, upon application made to Honorable John R. Brown, a member of this Court, a stay of execution was entered pending the final disposition of this case on this appeal. The case thus comes to us with

the unanswered and undisputed allegations in the petition for the writ of habeas corpus which clearly raised the question whether the failure of the District Attorney to disclose to appellants' counsel the *fact*, known to him, of the existence of opinions arrived at by specialists engaged by the State favorable to the accused if known in time for them to plan the strategy of, and conduct, their trial, is such a denial of due process as to invalidate the trial.

Moreover, here, we need not rely on the legal principle that for the purpose of this appeal we take the allegations in the petition for the writ as true for the purpose of testing the right of the trial court to deny it without a hearing as a basis for assuming the correctness of the underlying facts that posed the constitutional issue. This is so because not only did the State, in its brief in opposition to the grant of certiorari in the Supreme Court of the United States, substantially admit the facts, but counsel for the State, with commendable candor, conceded them in open court during the argument of this case.

In the brief filed on behalf of the State of Texas in the Supreme Court, the following language is found:

> "... the Harris County District Attorney requested Dr. Benjamin Sher, the Harris County Psychiatrist, Dr. Howard Crow, a psychiatrist, and Dr. Jack Tracktir, a psychologist, to examine both petitioners and each did make such examination . . . Dr. Sher . . . reported both petitioners sane. Dr. Crow reported petitioner Ashley 'needed treatment in a hospital, and he was sick and schizophrenic'. Dr. Tracktir 'was able to get the opinion he (Ashley) was psychotic'.
>
> "The opinion of Drs. Crow and Tracktir were made known to the District Attorney prior to the trial of

> the case, but the District Attorney did not inform the petitioners nor counsel for petitioners of the opinion of each doctor."

During oral argument before this Court, counsel for the State was asked whether it might be conceded that prior to the beginning of the trial of the two appellants, the District Attorney had been informed by Dr. Crow that in the opinion of himself and Dr. Tracktir the appellants were both legally incompetent, and that this information had not been conveyed to counsel for the appellants. Counsel acquiesced in this statement of the facts.

In *Pyle v. Kansas*, 317 U.S. 213, the Supreme Court, after having stated that the petition for habeas corpus filed in that case "do(es) set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, *and from the deliberate suppression by those same authorities of evidence favorable to him*," (Emphasis added) said:

> "These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody." Citing Mooney v. Holohan, 294 U.S. 103.

The Court thereupon remanded the case to the Supreme Court of Kansas to ascertain the truth of "these" allegations. In *Alcorta v. Texas*, 355 U.S. 28, the petitioner had been tried and convicted for murder in the first degree and sentenced to death. His defense was that his wife, whom he had killed, was caught by him with a friend in a compromising situation and that he had killed her under the influence of "sudden passion arising from an adequate

cause" which, if established as a defense, would have reduced the killing to murder without malice, punishable by a maximum sentence of five years imprisonment. Before the trial the prosecutor had been told by the friend that he had in fact had improper relations with the deceased, but he was cautioned by the prosecutor to answer all questions honestly, but not to volunteer any such information. The testimony on the trial touched rather lightly on the subject; the witness did not testify falsely, and he was not called upon to answer categorically as to whether he had had illicit relations with the deceased wife. In this context, the Supreme Court said:

> "Under the general principles laid down by this Court in Mooney v. Holohan, 294 U.S. 103, and Pyle v. Kansas, 317 U.S. 213, petitioner was not accorded due process of law. It can not seriously be disputed that Castilleja's testimony, taken as a whole, gave the jury the false impression that his relationship with petitioner's wife was nothing more than that of casual friendship. This testimony was elicited by the prosecutor who knew of the illicit intercourse between Castilleja and petitioner's wife. Undoubtedly, Castilleja's testimony was seriously prejudicial to petitioner. It tended squarely to refute his claim that he had adequate cause for a surge of 'sudden passion' in which he killed his wife. If Castilleja's relationship with petitioner's wife had been truthfully portrayed to the jury, it would have, apart from impeaching his credibility, tended to corroborate petitioner's contention that he had found his wife embracing Castilleja. If petitioner's defense had been accepted by the jury, as it might well have been if Castilleja had not been allowed to testify falsely, to the knowledge of the prosecutor, his offense would have been reduced to 'murder without malice' precluding the death penalty now imposed upon him."

Two cases in which the mere suppression of evidence by the prosecutor has served as a basis for a holding that a denial of due process occurred are *United States v. Dye*, 3 Cir., 221 F. 2d 763, and *United States v. Rutkin*, 3 Cir., 212 F. 2d 641. In the *Dye* case the prosecution failed to put on the witness stand, although subpoenaed to the trial, a police officer who had made a report during the investigation to the effect that the accused, later convicted of first degree murder, had smelled of liquor, and that he was under the influence of liquor to a quarrelsome degree; that his shirt and clothes were torn; and that he was perspiring and "mussed up." A police officer who arrested the accused testified that he was sober and that he did not appear to have been drunk. The defense had no knowledge of the report made by the arresting officer which was favorable to the defense. At the close of the session at which another officer testified, the prosecutor stated in open court:

> "At this time I can call a few other police officers who would corroborate what has already been testified to. I see no reason why we should merely prolong the testimony now when the witnesses are not here."

While it is true that there were other witnesses who would have corroborated the officer who had testified, it is also true that the one policeman, if called, would have testified favorably to the defense. The Court thereupon held that the evidence by the witness favorable to the defense "was substantial evidence which should have been, but never was, submitted to the jury (the only tribunal entitled to pass upon it) in connection with what the Court did charge as to the effect of the drunkenness of Thompson

. . ." We find ourselves fully in accord with the statement by Judge Hastie in the concurring opinion in the *Dye* case: "It seems likely that many situations will arise in which a prosecutor can keep to himself his knowledge of available testimony which he views as mistaken or false, but there are other circumstances in which a prosecutor must, or certainly should know that even testimony which he honestly disbelieves is of a type or from a source which in all probability would make it very persuasive to a fair-minded jury. This is notably true of testimony of a police officer, and most certainly of an arresting officer, favorable to a contention of an accused person."

In the case before us the State contends that at most the testimony that would be available from the psychiatrist Crow and the psychologist Tracktir would be in the nature of opinion evidence, and that no court has thus far held that the failure of the prosecution to disclose an opinion, even though favorable to the defense, works a deprivation of constitutional rights. The vice of this argument is that it is not the nature or the weight to be accorded to an opinion, but the *fact* that such an opinion had been formed by such an obviously objective witness as one engaged by the prosecution to make the examination. In this respect it falls very much within the concept of the *Dye* case, where it was a police officer whose testimony, if elicited, would have been helpful to the defendant.

We have no doubt that the prosecuting officer, during the trial of these two appellants, conscientiously believed them both to be legally competent. However, it is stretching our credulity to the utmost to ask us to believe that when he received word from Dr. Crow that he and Dr. Tracktir both considered both appellants legally incompe-

tent, he was not aware of the great, and possibly decisive, significance of such a fact if known to the accused.

The Court does not need to refer to the statement by way of an affidavit subsequently made by Mr. Knight, trial counsel for the appellants, to appreciate the materiality of this undisclosed fact. This affidavit is to be effect that when he learned that Dr. Sher, County Psychiatrist of Harris County, had informed Dr. Burch that Sher expressed the opinion the defendants were mentally competent to stand trial, "this led me to the conclusion that no other psychiatrist of any kind had examined the defendants or either of them, at the request of the District Attorney's office, and had I been informed Dr. Crow and Dr. Tracktir had made a finding that Leslie Douglas Ashley was of unsound mind and legally insane, as contemplated by the criminal laws of the State of Texas, then, of course, I would have enlisted further psychiatric assistance in the case and sought to have had the testimony of Dr. Crow and Dr. Tracktir adduced before a jury on a defense of insanity as to said Leslie Douglas Ashley[2] prior to the main trial, or as issues in the main trial, and in either event would have in all likelihood plead insanity as of the time of the commission of the offense and as of the time of the insanity hearing and the main trial, and would not have introduced Leslie Douglas Ashley as a witness in his own behalf in a joint trial of the two defendants."

We conclude that without any such expression from the trial counsel that the fact of the opinions of Drs. Crow

[2] It is to be noted that while Knight mentioned Ashley only, this is clearly due to the fact that it was given in connection with proceedings brought by Ashley alone and any reference to Lima would have been irrelevant.

and Tracktir, favorable to the defendants, is of such vital significance to the accused persons in planning and conducting their defense, the failure of the District Attorney to inform their counsel of this fact amounts to such fundamental unfairness in the trial of a criminal case as to amount to a denial of due process.

The judgment of the trial court of denying the application for writ of habeas corpus is, therefore, REVERSED and the case is REMANDED to the trial court with directions to issue the writ, and discharge the prisoners, without, of course, in any way precluding a new trial by the State of Texas.

The stay of execution heretofore entered by Judge Brown is continued until a final disposition of the matter in the Southern District of Texas.

REVERSED and REMANDED.

DeVANE, District Judge, Dissenting:

I am unable to concur in the able opinion of Chief Judge Tuttle in this case.

These appellants were represented by Jack Knight, a very able criminal trial lawyer of Texas. The record in the case discloses that the District Attorney of Harris County, Texas, following his usual policy on the occasion of the commission of a serious crime, called on the regularly employed county psychiatrist Dr. Sher to examine the appellants and in addition in this case he engaged Dr. Howard Crow, a practicing psychiatrist, to examine the

appellants and Dr. Crow engaged Dr. Jack Tracktir, a psychologist, to assist him in his examination of the appellants.

Of course, these appellants could not have been examined by these physicians without the knowledge of Jack Knight, their counsel, and this in my opinion was what led Mr. Knight to engage a crimnial psychiatrist, Dr. Burch, to examine them prior to trial. Dr. Burch expressed his opinion to Jack Knight in the language set out in the main opinion in which he concluded that appellants were at the time examined by him and at the time of the commission of the alleged crime aware of the nature and extent of their acts.

Faced with his own doctor's report, Mr. Knight saw fit to try this case without asserting the mental incapacity of the appellants, claiming only the defense of self-defense and defense of each other, claiming that the deceased had become violent in his treatment of Carolyn Lima and a struggle ensued, which resulted in his being shot and killed by one or the other of the appellants.

I am unwilling to substitute my judgment for that of Mr. Knight at the time he tried these cases and I am unwilling to assume on this record that Mr. Knight was unaware of the examination of these appellants by Doctors Sher, Crow and Tracktir before Appellants were placed on trial.

This is not a case where the District Attorney was guilty of any misconduct by refusing to make known to Mr. Knight information he had with reference to the sanity of these appellants and based on this record I am confident that had Mr. Knight sought from the District Attorney

information as to the reports of Doctors Sher, Crow and Tracktir, he would have been advised fully with reference to them. This case before us was brought by other counsel and not by Mr. Knight.

For these reasons I dissent in this case.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By: G. F. Gannicheau
Deputy

New Orleans, Louisiana

August 19, 1963

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20457

LESLIE DOUGLAS ASHLEY and CAROLYN LIMA,
Appellants

v.

THE STATE OF TEXAS, ET AL,
Appellees

Appeal from the United States District Court for the Southern District of Texas

(JULY 30 , 1963)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and DEVANE, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is hereby DENIED.

U.S. COURT OF APPEALS
filed
July 30, 1963
EDWARD W. WADSWORTH, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

NO. 63 - H - 225 CA.

LESLIE D. ASHLEY, ET AL, *Petitioners*

v.

THE STATE OF TEXAS, *Respondent*

ORDER

On this the 29th day of March, A.D. 1963, came on to be heard and considered the Motion to Stay Execution and the writ of Habeas Corpus in the above entitled cause and the Court being of the opinion that said Motion and Application should be denied, it is; therefore,—

ORDERED, ADJUDGED AND DECREED that the Motion for Stay of Execution is hereby denied to which action petitioners excepted and gave notice on appeal to the Court of Appeals for the Fifth Circuit—

Done and entered at Houston, Texas on this the 29th day of March, A.D. 1963

s/ Ben C. Connally
BEN C. CONNALLY, JUDGE

TRUE COPY I CERTIFY
ATTEST:
V. BAILEY THOMAS, Clerk
By s/ W. Paul Harriss
Deputy Clerk

Petitioners give notice of appeal
3 29/63

/s Clyde W. Woody
Atty. For Petitioners
1114 Texas Ave. Bldg.
Houston 2, Texas

APPENDIX E

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 34351

LESLIE DOUGLAS ASHLEY and CAROLYN LIMA, *Appellants*

v.

THE STATE OF TEXAS, *Appellee*

Appeal From Harris County, Texas

OPINION

Leslie Douglas Ashley and Carolyn Lima were jointly tried and convicted for the offense of murder with malice; the punishment assessed by the jury for each appellant, death.

The state's testimony shows that when officers of the City of Houston arrived at a vacant lot to extinguish a fire on the night of February 6, 1961, they discovered a burning, almost nude male body, later identified as that of the deceased. An autopsy revealed that gasoline had been poured on the body and ignited after the deceased had been killed as a result of being shot six times with a .22 caliber pistol.

Further testimony of the state revealed that the appellants were seen parking their old Packard auto and entering the deceased's office on one side of a duplex about 5 P.M. on February 6, the day of the shooting. About 6:30 P.M., the occupant of the other side of the duplex, an employee of deceased, heard some noise and scuffling in the deceased's office which sounded like a fight, and also an unusual noise like a shot. However, she did not become

alarmed until the next morning when she arrived for work at the deceased's office and found blood at the entrance and on the floor.

An investigation of the premises by the police revealed blood both in and outside of the office; tire tracks across the sidewalk leading to the door of the office; that the deceased's portable television and Lincoln automobile were unexplainably missing. Further police investigation led to the recovery of various articles of the deceased's clothing which had been discarded in scattered locations in the city, and the appellant's old Packard was found parked without license tags at the home of Ashley's parents.

The testimony of other witnesses established that the appellants had purchased a pistol two days prior to the shooting; that they had been seen firing it into a ditch; and that these slugs were recovered and established to have been fired from the same weapon that killed the deceased. It was further shown that at about 7:30 P.M., February 6, Lima had purchased gasoline in a five gallon can, which she did not return; that this was the same can which was found near the burning body; and that about 10:30 P.M. of the same night the appellants had filled the deceased's Lincoln with gasoline, and put the Packard license plates on it.

The state then introduced testimony tracing the flight of the appellants from New Orleans, where they spent one night, to Maryland and finally to New York City where Lima and Ashley, who was dressed as a woman, were apprehended on February 26, 1961, by Federal Agents. The deceased's Lincoln, to which Lima had the keys, was recovered and after obtaining the appellant's consent, a search of their apartment revealed the missing

television set, a box of .22 caliber cartridges, and the deceased's wrist watch.

Appellant Lima, an admitted prostitute, and Appellant Ashley, an admitted homosexual, both testified in open court admitted killing the deceased but contended that they did so in self defense and in defense of each other.

The appellants testified that they were living together in December of 1960 when Lima met the deceased and began having paid sexual relations with him about once a week. Ashley first met the deceased while disguised as a woman, but later was introduced as Lima's brother. The deceased subsequently suggested that Ashley be a part of a perverted, three-way act of sexual deviation, and on February 6, the appellants went to deceased's office to engage in these acts with him. While discussing these sordid matters, deceased lightly stuck both appellants with his "bayonet", and when deceased proposed that he and Ashley engage in acts of sodomy he became very angry and cursed when Ashley refused. The deceased and Lima then partially disrobed and had been committing sodomy on each other when the deceased started "getting rough" and tearing at her private parts. When Lima began crying out Ashley intervened and deceased started hitting and choking him. During their struggle Ashley got the pistol out of Lima's purse and fired one shot before dropping it. Deceased grabbed the "bayonet" and started swinging it at the appellants, but Lima managed to grab the pistol and fire the remaining five shots which felled the deceased.

After determining the deceased was dead, they became panicky but did manage to wipe the blood and fingerprints off of the "bayonet". Then, when their Packard would not start, they backed deceased's Lincoln to the

front door of the office, loaded the body into the back seat, pushed off the Packard, and went to the home of Ashley's parents. Ashley's parents corroborated that Ashley was bruised and bleeding and that Lima had cuts and bruises on her thighs when they arrived, and that the appellants said that they had been in a fight when asked what had happened.

The appellants then related that they threw the deceased's clothing in various parts of the city, dumped the body and set fire to it, put the Packard license plates on the Lincoln, and began their flight which ended with their arrest in New York City.

The appellants both testified that they were in fear of their lives during the struggle with the deceased in his office, and that they had gone to his office only for the perverted purposes but that when they realized how this would look to others they "panicked" and fled. They further testified that the various items of deceased's property were taken only because they knew that they would need money for their flight, and that they did not know of the $115 in deceased's billfold until they found it where it had fallen on the floor of the Lincoln. The appellants also testified that the pistol had been purchased because of trouble with teen-age boys with whom the appellants had been engaging in various sexual acts, and a policeman corroborated that he had been called to the appellants' apartment about February 3, 1961, because of trouble there.

The appellants' contention that they killed the deceased in self defense and in defense of each other was properly submitted to the jury, but rejected by them, and the evidence is sufficient to support their verdicts.

The appellants urge error because of the admission of a portion of a telephone conversation between the deceased and his wife over their objection that it was hearsay and prejudicial.

That portion complained of occurred when the wife arrived home from work about 5 P.M., telephoned deceased at his office about two blocks away, and he told her "to figure on having dinner at 6 o'clock".

The appellants testified that the deceased was using the telephone when they arrived at his office at 5 P.M., and Lima stated they left about 6:30 P.M., ten minutes after the killing which they both admitted.

The statement objected to was not itself inculpatory and, as used, was not reasonably calculated to prejudice the rights of the appellants. No reversible error is shown.

By formal bill of exception, the appellants strenuously contend that the trial court erred in refusing to grant a mistrial following the outcry of deceased's widow during the jury argument by appellants' counsel.

The bill recites that while appellants' counsel was presenting his argument the following occurred:

Appellant's Counsel: "* * * don't you know that they would have had every member of the _____ (deceased's) family to say, why certainly, not, Daddy came home at 6:00 o'clock that evening and he had a cocktail and he put on his houseshoes and he watched television * * *"

Deceased's Widow (speaking from among the courtroom spectators): "And he certainly did; he was with me at the Ben Milam Hotel."

Appellant's Counsel: "If it please the Court, we move for a mistrial on the basis of this outcry."

The Court: "Overruled."

Appellant's counsel "And note our exception, please."

The trial court, without request, immediately instructed the jury to disregard the statement and the incident for any purpose whatsoever, and the bailiff promptly escorted deceased's widow from the courtroom. According to the bill, the spectator "spoke out in a voice which was barely audible", and "the words used by her were not entirely discernible by the court". The occurrence lasted only some thirty seconds and argument was resumed and concluded without further interruptions.

This Court held in *Guse v. State*, 97 Tex.Cr.R. 212, 260 S.W. 852, that probability of injury to the appellant is essential to vitiate the jury's verdict because of the conduct of bystanders. In determining such probability, each case depends on its own environments. *Long v. State*, 59 Tex.Cr.R., 103, 127 S.W. 555; 1 Branch's Ann.P.C. 2d 423, Sec. 400.

The record in this case shows that the context of the widow's statement did not contradict the appellant's testimony relating to certain activities between them and the deceased at the time mentioned in the argument. Further, the trial court acted promptly and instructed the jury not to consider such matters. In view of these circumstances, there appears no reasonable probability of injury, and no reversible error is shown.

Appellants complain of the refusal by the trial court to admit the testimony of the witness Billingsley concerning the deceased's reputation for chaste character.

There is no showing of what the answer of the witness Billingsley would have been had he been permitted to testify. Hence, no error is shown.

Appellants also complain of the trial court's refusal to admit testimony relating to a specific act of sexual aggressiveness by the deceased.

There is no proof that the specific act inquired about was known to and influenced the appellants in killing the deceased. The refusal of its admission in evidence was not error.

It is insisted that the trial court erred in admitting the oral statements made by the appellant Lima to F.B.I. Agent Reuther, after her arrest in New York, that the trouble at deceased's office was caused by either physical assault, blackmail, or insult. Appellants contend that no proper predicate was laid authorizing the admission of the oral statements because the officers already had the Lincoln automobile in their possession prior to Lima's arrest.

From the record it is apparent that the oral statements were a part of the same conversation in which Lima told Agent Reuther about the keys to the Lincoln automobile and, for the reasons set forth below, became admissible.

Testifying at the trial, Lima stated that she had the keys to deceased's Lincoln automobile in her purse when arrested and that later when her purse was emptied on a desk during an interview with Agent Reuther, she was asked to identify the objects on the desk. These objects consisted among other things, of several keys, and she pointed out and identified certain keys, saying they were the keys to deceased's Lincoln automobile.

The evidence shows that Agent Reuther first saw the keys when Lima's purse was emptied on the desk after

her arrest, and that he then had no knowledge to what automobile the keys belonged. These keys were subsequently found to fit the ignition of deceased's Lincoln automobile. This evidence is sufficient to show that the Lincoln automobile had recently been under the control and in the possession of the appellants.

Art. 727 Vernon's Ann.C.C.P. authorized the admission of such oral statements "when they are found to be true and conduce to establish the guilt of the accused". This statute has been construed in *Valtierra v. State*, Tex.Cr.App., 219 S.W. 2d 73, as authorizing the introduction of an oral confession of the accused as to the whereabouts of the hat of the deceased when the body of the deceased had already been found by the officers. There, this Court said, "The officers had no knowledge of its (the hat's) whereabouts". The officers in the case at bar had no knowledge concerning the keys. The opinion continues: "The facts here present demonstrate that facts and circumstances may be stated by an accused which unquestionably are inculpatory and conduce to establish his guilt, and yet neither lead to the recovery of stolen property or the instrument with which the offense was committed." See also *Hamon v. State*, 135 Tex.Cr.R. 347, 119 S.W. 2d 1057, *Mobley v. State*, 98 Tex.Cr.R. 238, 265 S.W. 653, and *Ortiz v. State*, 68 Tex.Cr.R. 524, 151 S.W. 1056.

Under these facts and circumstances of this case, the oral statements complained of were authorized to be admitted into evidence, and no error is reflected in their admission.

The judgments are affirmed.

Opinion approved by the Court.

Belcher, Judge

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

NO. 34351

LESLIE DOUGLAS ASHLEY and CAROLYN LIMA,
Appellants

v.

THE STATE OF TEXAS,
Appellee

Appeal from Harris County, Texas

OPINION ON APPELLANTS' MOTION FOR REHEARING

Appellants insist that we were in error in our holding that the admission in evidence of that portion of the telephone conversation between the deceased and his wife at about 5 o'clock, p.m., on the day of the killing, in which the deceased told his wife "to figure on having dinner at 6 o'clock," over the objection that the same was hearsay and prejudicial, did not constitute reversible error. Appellants insist that the admission of such evidence constituted reversible error, because it presented to the jury statements made by the deceased which were unknown to appellants and which struck at the very heart of their defense that they went to the deceased's office for the purpose of having a sexual date.

In support of their contention, appellants rely upon the early case of Brumley v. State, 21 Tex. App. 222, 17 S.W. 140, where it was held that proof of the deceased's undisclosed reason or motive in being where he was, or in going to the scene of the homicide, is not admissible against an accused where it tends to affect his defensive theory.

Reliance is also had by appellants upon the recent case of Marshall v. State, 168 Tex. Cr. R. 569, 330 S.W. 2d 625, where similar proof was condemned by this court under the holding in Brumley, supra. In their brief, appellants concede that under an exception to the rule, proof of movements of the deceased not known to a defendant which is merely explanatory of his presence at the scene of the killing is admissible where such proof does not affect a defensive theory. See: Bazanno v. State, 60 Tex. Cr. R. 507, 132 S.W. 777.

While appellants' objection to the telephone conversation as being hearsay was well taken, we remain convinced that, under the record presented, the admission of such evidence does not present reversible error. Proof that the deceased indicated in the telephone conversation with his wife at 5 o'clock, p.m., that he would be home around 6 o'clock, p.m., did not controvert appellants' defensive theory that they went to the deceased's office at 5 o'clock, p.m., to fulfill a prearranged sexual date. There is no proof that the sexual date would be of such duration that it could not have been completed and the decease be at his home around 6 o'clock, p.m. Furthermore, the proof that the deceased indicated to his wife in the telephone conversation that he would be home around 6 o'clock, p.m., may have been beneficial to appellants and have supported

their defensive theory that they went to his office to fulfill the prearranged sexual date, in that it could be construed as an effort on deceased's part to keep his wife from coming to his office while the sexual date was being consummated.

Appellants further insist that we were in error in holding that, under the facts, no probability of injury was shown as a result of the outcry of the deceased's widow, made during the argument of appellants' counsel. As shown in our original opinion, while appellants' counsel was arguing that if it were not true that on Saturday night before the killing on Monday the deceased was with appellants, the members of the Tones family would have said he came home at 6 o'clock that evening, she stated: "And he certainly did; he was with me at the Ben Milam Hotel." Appellants especially take us to task for the statement in our opinion: "The record in this case shows that the context of the widow's statement did not contradict the appellants' testimony relating to certain activities between them and the deceased at the time mentioned in the argument." Appellants further point to certain testimony in the record to the effect that on the Saturday night in question the deceased was with them and on such occasion did go to their apartment to have sexual relations with Carolyn Lima.

While such was the evidence adduced and the statement in our opinion is subject to correction, we remain convinced that the widow's outcry, under the record, does not call for a reversal of the convictions. Whether the deceased was at the Ben Milam Hotel with his wife, or with the the appellants on Saturday night before the killing, such had no direct bearing upon the actual killing and the issue of self-defense interposed by the appellants.

Appellants admitted shooting the deceased and their only defense was that of self-defense. The widow's outcry had no bearing upon such issue and, clearly, no probability of injury is shown.

We again overrule appellants' remaining contention that the court erred in refusing to admit testimony offered by them relating to a specific act of sexual aggressiveness by the deceased. As stated in our original opinion, there was no proof that the specific act inquired about was known to our influenced the appellants in killing the deceased. The case of Newchurch v. State, 135 Tex. Cr. R. 619, 121 S.W. 2d 998, supports the trial court's action in excluding such testimony.

The authorities cited by appellant in support of their contention that such testimony was admissible to corroborate and support their theory and claim that the killing was because of the sexual aggressiveness of the deceased are not here controlling. In the cases cited it was shown that the accused either had knowledge of the prior similar act and was seeking to corroborate such knowledge, or there was a disputed issue as to whether the deceased committed the act or acts relied upon as a basis of the accused's defense, at the time of the killing. Here, there was no proof that appellants had any knowledge of the prior act of sexual aggressiveness of the deceased and their testimony as to his sexual aggressiveness on the day of the killing was in no way disputed.

Remaining convinced that a proper disposition was made of the case in our opinion on original submission, the motion for rehearing is overruled.

Opinion approved by the Court.

Dice, Judge